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No. 73-412

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT E. IANNELLI AND DOLORES IANNELLI, HIS WIFE, PETITIONERS

v.

H. ALAN LONG, DISTRICT DIRECTOR, PITTSBURGH, PENNSYLVANIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B 12a-15a) is not yet officially reported. The opinion of the district court (Pet. App. A 1a-11a) is reported at 333 F. Supp. 407.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973 (Pet. App. B 12a). A petition for rehearing was denied on July 26, 1973 (Pet. App. C 16a). The petition for a writ of certiorari was filed on September 4, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 7421(a) of the Internal Revenue Code prohibits an injunction restraining officials of the Internal Revenue Service from executing on certain liens or otherwise attempting to collect upon a jeopardy assessment issued for failure to pay federal wagering excise taxes allegedly due.

STATUTES INVOLVED

Sec. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax.*—* * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *.

* * * * *

STATEMENT

On March 25, 1971, petitioners were indicted for conspiring to violate and violating various federal gambling statutes (App. 103; Supp. App. 32, 34).[1] After a previous abortive assessment and levies, the Internal Revenue Service issued on August 6, 1971, a jeopardy assessment against petitioners jointly of $722,205.18 for failure to pay federal wagering excise taxes alleged to be due under Section 4401 of the Internal Revenue Code of 1954 (App. 7, 20-21). Thereafter, the Internal Revenue Service filed a lien against petitioners and levied on their various properties (App. 18-25, 77-78).

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[1] "App." and "Supp. App." refer to the appendices in the court of appeals.

The jeopardy assessment was based upon a projection of petitioners' wagers determined from records seized by the Pennsylvania State Police on September 20, 1969,[2] and from information obtained pursuant to a court-authorized electronic surveillance (in operation during the period October 21, 1970 through November 2, 1970), which revealed that petitioners were accepting wagers on numbers, football games and horse races[3] (App. 36-38, 41, 44-45,

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[2]Following denial of his motion to suppress the seized records as evidence in state court proceedings, petitioner Robert Iannelli pleaded guilty in a Pennsylvania court to illegal gambling (App. 96, n. 1, 105, n. 4).

[3]Petitioners in the federal criminal proceeding moved to suppress this evidence obtained from the electronic surveillance. They alleged that the procedure followed by the Department of Justice in its application to a federal judge for an interception order did not comply with the requirements of Title III, Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520) and that there had been an unauthorized disclosure of the material to the Internal Revenue Service. The district court denied the motion to suppress. *United States* v. *Iannelli,* 339 F. Supp. 171 (W.D. Pa.). Thereafter, petitioner Robert Iannelli was convicted, but the jury was unable to reach a verdict on Dolores Iannelli. On Robert Iannelli's appeal, the contentions raised in his motion to suppress were rejected and his conviction was affirmed. *United States* v. *Iannelli,* 477 F. 2d 999 (C.A. 3). Dolores Iannelli was retried and convicted. On appeal, her conviction was affirmed in an opinion, which is not yet officially reported.

Both petitioners have filed petitions for writs of certiorari in their criminal cases (Nos. 73-64 and 73-103, October Term, 1973), which raise the question whether the procedures for authorization followed by the Department of Justice complied with the statute. The question is presently before this Court in *United States* v. *Chavez,* No. 72-1319, certiorari granted, May 21, 1973, and *United States* v. *Giordano,* No. 72-1057, certiorari granted, March 26, 1973. As a result, the government has suggested that this Court may wish to defer disposition of those petitions until after the decisions in *Chavez* and *Giordano.*

96-99). The average amount wagered per day in each category was determined and this figure was then projected for the period of September 1969, through October 1970. The resulting figure was taken as the total gross wagers accepted and the federal wagering excise tax computed on this amount (App. 43, 97-99).

On September 27, 1971, petitioners commenced this action seeking a preliminary injunction against collection efforts by the Internal Revenue Service. They alleged that the actions of the Internal Revenue Service were part of an attempt to force petitioners to waive their Fifth Amendment rights or to forfeit their real property; that the assessment was based upon illegally obtained evidence; and that they faced immediate and irreparable injury without an adequate remedy at law (App. 8-9).

After a hearing, the district court issued a temporary injunction prohibiting the Internal Revenue Service from executing on the liens or attempting to collect the jeopardy assessment (App. 113; Pet. App. A 10a-11a).[4] The court, noting that petitioners were under indictment, concluded that collection activities should be enjoined "until such time as the criminal proceedings have terminated, the criminal statute of limitations shall have tolled, or such earlier event as may occur to protect the rights of the parties" (App. 112; Pet. App. A 10a). On appeal, the Third Circuit reversed because of the bar against such injunctions provided by Section 7421(a) of the Internal Revenue Code of 1954, which states that "* * * no

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[4]The order also provided that all liens were to remain in full force and effect; that petitioners could not alter any property to which a lien was applicable; and that a Receiver was to be appointed to collect rents from petitioners' realty and apply the sums collected to outstanding mortgages and to deposit any remaining monies in interest-bearing accounts (App. 113; Pet. App. A 11a).

suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *."

ARGUMENT

1. In holding that petitioners were not entitled to injunctive relief against the collection of the wagering taxes at issue, the court of appeals correctly applied Section 7421(a) of the Internal Revenue Code. That provision prohibits suits to restrain the assessment or collection of any tax. As this Court explained in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7:

> The manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. [Footnote omitted].

In *Williams Packing* the Court unanimously held that the only situation in which the collection of taxes might be enjoined is where it is clear that under no circumstances could the government ultimately prevail.

Here, the district court made no finding that the asserted tax deficiencies could under no circumstances be upheld in a refund suit. Nevertheless, it enjoined collection efforts by the Internal Revenue Service as a result of its view that, without such relief, petitioners' asserted Fifth Amenment rights would not be protected. Specifically, the district court believed that petitioners would otherwise be forced to choose between forfeiting their property without contesting the tax assessments or possibly incriminating themselves by admitting in a tax refund suit that they had been engaged in illegal activities for which they had been indicted.

Contrary to the district court's assumption, petitioners are not subject to a choice between such alternatives. As the court of appeals pointed out, a refund claim and complaint adequate to toll the statute of limitations could be drafted and filed without damaging admissions, and further proceedings in such a suit would properly be deferred on petitioners' request until the conclusion of related criminal proceedings or until the expiration of all applicable periods of limitations on prosecutions (Pet. App. B 14a). Under these circumstances, no danger of self-incrimination would arise.

Moreover, the fact that the assessment appears to have been based in part upon evidence obtained by means of electronic surveillance does not, as petitioners urge (Pet. 8-11), remove the case from application of the *Williams Packing Co.* rule. Petitioners' claim that the validity of the surveillance is "in serious question" (Pet. 11) does not justify restraining the collection of the taxes until after the disposition of the criminal cases. The injunctive relief sought by petitioners may be granted "[o]nly if it is * * * apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim." *Enochs* v. *Williams Packing Co., supra,* p. 7. Since the questions raised in petitioners' criminal cases have been decided adversely to them at both the district court and court of appeals level and are presently pending before this Court in other cases to be decided this Term, "under the most liberal view of the law and the facts" the validity of the government's tax claim would be upheld. Finally, apart from the validity of the electronic surveillance, there was other evidence which might be sufficient to sustain the tax assessment.

2. Neither *Lucia* v. *United States,* 474 F. 2d 565 (C.A. 5), nor *Pizzarello* v. *United States,* 408 F. 2d 579 (C.A. 2),

certiorari denied, 396 U.S. 986, cited by petitioners (Pet. 6-7), are in conflict with the decision below. Both of those cases hold, in accordance with *Williams Packing Co.*, that even if the taxpayer faces irreparable financial injury, the courts are not free to enjoin the collection of taxes unless it can be shown that the assessment is arbitrary, capricious, and without foundation.[5] Here, petitioners have not made the requisite showing to support injunctive relief. As the court of appeals observed, the actions of the Internal Revenue Service "appear to have been bona fide and potentially productive attempts to collect revenue" (Pet. App. B 14a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]Contrary to petitioners' suggestion, there is no relationship between this case and *Alexander* v. *"Americans United" Inc.*, No. 72-1371, certiorari granted, June 4, 1973, and *Bob Jones University* v. *Shultz*, certiorari granted, October 9, 1973. Both of those cases present the question whether Section 7421(a) and the Declaratory Judgment Act, 28 U.S.C. 2201-2202, bar an injunctive action either to compel the Commission to grant tax exempt organization status or to prevent him from revoking such status.